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Deferral to Arbitration and Use of External Law in Arbitration

Theodore J. St. Antoine

University of Michigan Law School, tstanton@umich.edu

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Theodore St. Antoine†

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I

THE PECULIAR ROLE OF AN ARBITRATOR

A proper definition of the appropriate roles of arbitrators, administrative agencies and the courts depends in great part on the notion that, generally speaking, in labor relations, the interpretation and application of contracts is for arbitrators, and the interpretation and application of statutes is for the administrative agencies and the courts. Arbitrators deal primarily with contract rights and administrative agencies, like the NLRB and the courts, deal primarily with statutory rights. If that distinction is maintained, the problems of deferral to arbitration and the use of external law in arbitration can be more easily resolved.

It is a fundamental notion that parties generally commission arbitrators to read their contract and tell them what that contract means. Arbitrators are thus contractually empowered to provide the parties with a definitive interpretation of their agreement. That idea is so basic that a court, in reviewing an arbitral award, should treat it as if the parties themselves had stipulated that this was their interpretation of their contract. The notion that the arbitrator commits gross error in interpreting the contract then becomes a contradiction in terms.

David Feller, in a brilliant article, suggested that the peculiar nature of the arbitrator's role as interpreter of the collective bargaining agree-

† James E. & Sarah A. Degan Professor of Law, University of Michigan; A.B., Fordham College, 1951; J.D., University of Michigan, 1954; Member, Board of Governors, National Academy of Arbitrators; Council Member, American Bar Association Section of Labor and Employment Law.

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ment arises from the fact that the arbitrator is really setting terms that the parties could not have agreed upon because there are an infinite variety of situations unanticipated at the time the bargain is struck.²⁷ Feller argues that collective bargaining agreements must, in fact, deal with these situations, if not in actuality, then putatively.

The real explanation for the nature of the arbitral role is a simpler one and applies to all arbitration agreements, whether labor arbitration or nonlabor arbitration. My view is simply that the arbitrator, in the labor context or otherwise, has this peculiar status because it is what the parties have agreed to. The collective bargaining agreement states explicitly that the arbitrator's decision shall be final and binding. As the precedents show, the answer is the same in commercial arbitration as it is in labor arbitration.

II

APPLICATION OF EXTERNAL LAW IN ARBITRATION

A question regarding external law in arbitration arises in two ways: in regard to the arbitrator's role, how the arbitrator should interpret the contract insofar as it may be affected by external law; and in regard to the court's role, how external law may apply to the enforcement of the award if the award is contested and goes to court.

A. Arbitrators' Jurisdiction Under Collective Bargaining Agreements

The notion that the arbitrator's authority depends upon the commission from the parties leads to the conclusion that ordinarily and theoretically the arbitrator is to apply the contract, not external law. The leading Supreme Court case of *United Steelworkers v. Enterprise Wheel & Car Corp.*,²⁸ the last of the Steelworkers Trilogy, specifically states that the arbitrator must not base her decision solely upon her view of the requirements of enacted legislation. The arbitrator's interpretation, to be valid, must "dra[w] . . . its essence from the collective bargaining agreement."²⁹

In disputes that have caused a great deal of theoretical turmoil within the National Academy of Arbitrators and elsewhere over the years, I have taken the position that that rule applies even if the arbitrator concludes that the contract is in conflict with a statutory provision.³⁰ If there is a direct, irreconcilable conflict between the arbitrator's notion of what the contract requires and her view of what a particular statute

27. Feller, *The Remedy Power in Grievance Arbitration*, 5 INDUS. REL. L.J. 128, 134-37 (1982).

28. 363 U.S. 593 (1960).

29. *Id.* at 597.

30. See, e.g., St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137 (1977).

requires, the arbitrator should follow the contract because it is the contract and not the law that the parties have asked the arbitrator to interpret and apply.

Many arbitrators are not lawyers. The arbitrator's view of the law may, in fact, be erroneous. The parties are asking for a reader of the contract to tell them what the contract means. It is then up to the courts to deal with the question of whether that reading is or is not in accord with enacted legislation.

In practice, much of this great debate about contract versus law is a tempest in a teapot, the importance of which may be exaggerated. First, if the parties have used contractual language that directly tracks the language of a statute, such as the National Labor Relations Act or the Civil Rights Act of 1964, that contractual language must be interpreted as an invitation to the arbitrator to read the contract in light of the statute. The parties have undoubtedly intended that the contractual rights with which they are dealing be analogous to the statutory rights. Therefore, in this situation, the arbitrator may take account of administrative and judicial decisions interpreting the statute as a guide to interpreting the contractual rights.

Second, there is no reason why the parties cannot empower the arbitrator, either implicitly or explicitly, to take enacted legislation into account. In the majority of cases where the contractual language is subject to two different readings—one which would be valid under the law and one which would be struck down as invalid—an arbitrator is merely exercising common sense if she concludes that the contract should be read in its valid sense.

Ultimately, however, the arbitrator's commission is grounded in the collective bargaining agreement or the ad hoc stipulations of the parties appointing her. Her authority can rise no higher than its source, the agreement of the parties providing for that commission.

B. Judicial Review of Arbitral Awards

When a court reviews an arbitration award, the Supreme Court has made it very clear over the years that the court should not concern itself with the merits of the determination. If the arbitrator has acted within her jurisdiction, has not been corrupt and has not denied the parties due process, then the court should accept her reading as the definitive interpretation of the contract even if the court might have read the contract differently. Simply put, a court should not indulge in second-guessing.³¹

This view has given rise over the last couple of years, however, to some serious inquiries about what a court should do when it finds that

31. See 363 U.S. at 599; *AT&T Technologies, Inc. v. Communications Workers*, 106 S. Ct. 1415, 1419 (1986).

the arbitrator's reading of the contract is correct but that it conflicts with certain public policy notions. Should the court set aside the award? Although the court should bow to the interpretation that the arbitrator has rendered, it is also the function of the court to make certain that the enforcement of the arbitral award will not constitute a violation of law.

The issue that has emerged over the last few years in a series of contested cases in the courts of appeals is the extent to which a court should go beyond actual legislation or well-accepted principles of common law and indulge in its own notions of general public policy in determining the extent to which an arbitral award should be enforced.³² In a case currently before the Supreme Court, *Paperworkers v. Misco*,³³ the Court may provide some insight into the resolution of this problem.

In *Misco*, an arbitrator's reinstatement of a worker discharged for allegedly smoking marijuana was set aside by the court of appeals—after rewriting the findings—on the ground that it was contrary to public policy to reinstate an employee who worked with dangerous machinery and smoked marijuana on the job.³⁴ It appears that the case will be reversed on the facts. But more important is what the Supreme Court may decide about the role of public policy notions in court review of arbitral awards.

In my judgment, the position the Court should follow is set forth in the amicus curiae brief written on behalf of the National Academy of Arbitrators by arbitration expert David Feller.³⁵ In the brief, he argues that a court should not indulge in general notions of public policy in order to set aside an arbitration award; it is only when the award would call for the violation of some clear statutory principle or some fundamental principle of common law that a court should step in. Whether people should or should not be reinstated because they smoked marijuana is the kind of question that should be left to arbitration; the court should not engage in that kind of policymaking.³⁶

There are number of court decisions which have taken the position espoused in this brief—that it is better to narrow the range of review so that courts will not indulge their own notions of public policy. Under

32. See *S.D. Warren Co. v. United Paperworkers' Int'l Union*, Local 1069, 815 F.2d 178, 186-87 (1st Cir. 1987); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 808 F.2d 76, 78 (D.C. Cir. 1987); *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 615-17 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 186 (1987).

33. *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364 (1987) (decided subsequent to the Symposium).

34. *Misco, Inc. v. United Paperworkers Int'l Union*, 768 F.2d 739 (5th Cir. 1986), *rev'd*, 108 S. Ct. 364.

35. National Academy of Arbitrators Amicus Curiae Brief for Petitioners (No. 86-651).

36. *Id.* at 20-26. In reversing, the Supreme Court noted that the circuit court cited no statutory or case law which the worker's actions violated. The Court stated that a court reviewing an arbitration award can refuse enforcement only when the award violates "existing laws and legal precedents . . . establish[ing] a well-defined and dominant policy . . ." 108 S. Ct. at 374 (quotation omitted).

this view, the role of the courts is limited to ensuring that the enforcement of the award does not directly violate an accepted statutory principle or fundamental principle of common law.³⁷

III

DEFERRAL TO ARBITRATION

The question of deferral to arbitration has two distinct aspects: deferral to an award that has already been issued, and deferral to the process prior to its being invoked. In both situations, a clear demarcation between the arbitrator's contract-reading role and the NLRB's statute-interpreting roles can resolve the deferral problems.

A. Deferral to an Award

For many years, the National Labor Relations Board has held under the *Spielberg* doctrine that it will recognize or honor an arbitration award as long as the proceedings have been fair and regular, all the parties have agreed to be bound, and the decision is not clearly repugnant to the purposes and policies of the Act.³⁸ It is troubling that the *Spielberg* doctrine leads to the Labor Board's accepting an arbitration decision as a determination of whether or not there was an unfair labor practice—a question involving interpretation of statutory rights.

Rather, the Labor Board should recognize that what the arbitrator is deciding is whether or not there was just cause for the discipline that had been imposed under the contract. Of course, the Board may appropriately make use of that finding as to contract violation in making its determination as to whether there was a statutory violation. An arbitral finding of just cause for dismissal, for example, will be relevant to the question of whether an employee actually was disciplined because she engaged in a union activity. But in the one case it is a contractual issue, and in the other case it is a statutory issue.

More recently in the *Olin Corp.* case, the Board added some refinements to its doctrine, enlarging the scope of deferral. The Board established a rule that the existence of parallelism between contractual and statutory rights would be a sufficient basis for the Board to defer if the arbitrator had been presented generally with the facts bearing on the un-

37. See, e.g., *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983) (the public policy that would justify a court's refusal to enforce an arbitral award "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests' " (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945))); *Northwest Airlines v. Air Line Pilots Ass'n*, 808 F.2d 76, 78 (D.C. Cir. 1987) (upholding arbitral reinstatement of alcoholic pilot); *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986) (upholding arbitral award where arbitrator excluded grievant's statements as a violation of *Miranda* rights).

38. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955).

fair labor practice issue.³⁹

The Board must realize that the same issue is technically not before the arbitrator that is before the Board, because the arbitrator is dealing solely with a contractual question. The Board should never abdicate its fundamental function of dealing with the statutory question. In the future, the courts must examine more closely the nature of the Board's deferral actions.

B. Pre-Award Deferral

The more difficult problem is the situation in which an employee has filed a charge of antiunion discrimination with the Board against an employer⁴⁰ and the employer contends that the employee could have gone through the grievance and arbitration procedure because the contract also protects him against discrimination because of union activity. Under this contention, the Board should defer to an arbitration of the question.⁴¹

In the *Collyer*⁴² case, the Board first accepted the notion that it would defer to arbitration where the charge was not one of individual discrimination, but rather of a refusal to bargain, in a context where the refusal to bargain was essentially a unilateral change of working conditions. As the employer's actions were arguably in violation of the contract, they were arguably subject to the grievance and arbitration procedure. Rather than interpreting the contract itself, the Board deferred to the arbitrator.

It is far more appropriate, in my view, to accept the deferral doctrine in a section 8(a)(5) refusal-to-bargain situation, because the essential issue in most of these cases is the meaning of the contract. An arbitral review of whether the employer did engage in a unilateral change examines the question of whether the employer violated some provision

39. *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984). There may be some disagreement among the courts of appeals concerning the NLRB's revised standards for deferring to arbitration awards. Compare *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986) (Board may not presume that all arbitral proceedings confront and decide every possible unfair labor practice issue in bipartite grievance-arbitration proceedings) with *Bakery Workers Local 25 v. NLRB*, 730 F.2d 812 (D.C. Cir. 1984) (apparently accepting new *Olin Corp.* standards for deferral when arbitrator has been "presented generally" with facts relevant to resolving unfair labor practice).

40. The *Spielberg* postaward deferral doctrine has long been held applicable to cases arising under both § 8(a)(3) (individual discrimination) and § 8(a)(5) (unilateral change/refusal to bargain) of the NLRA (29 U.S.C. § 158(a)(3), (5)(1982)). See, e.g., *Taylor*, 786 F.2d 1516 (§ 8(a)(3)); *Bakery Workers*, 730 F.2d 812 (§ 8(a)(5)).

41. Cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (employee's statutory right to a trial de novo, under Title VII of the 1964 Civil Rights Act, could not be foreclosed by a prior submission of his claim to final arbitration under the antidiscrimination clause of a collective bargaining agreement).

42. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

in the contract with the action that it took. That is peculiarly subject to the jurisdiction of the arbitrator.

The Board, however, has not developed a clear doctrine about this kind of deferral. It has not recognized that the *Collyer* situation is not the only kind of case in which a section 8(a)(5) can arise. Some of the cases in which a section 8(a)(5) refusal-to-bargain charge is filed after unilateral action involve situations where the matter is not covered by the contract at all; it may be a matter completely omitted from the contract. Ordinarily, an arbitrator will find that the employer did not violate the contract in that situation because there was no provision in the contract preventing the employer from taking that particular action. The problem, however, is that it still may be a section 8(a)(5) violation. It may be the taking of unilateral action with regard to a mandatory subject of bargaining not covered by the contract and, therefore, subject to the duty to bargain during the life of that agreement, absent an appropriate management-rights clause or a zipper clause. The Board has not fully appreciated this distinction.

With regard to the individual discrimination cases, the Board has vacillated over the years. There have been several three-to-two decisions overruling one another, the current position of the Board being that it will defer to the grievance and arbitration process with regard to individual claims as well as with regard to refusal-to-bargain cases.⁴³

This approach to individual claims is more troubling. A strong argument can be made that an individual employee has a statutory right to invoke the processes of the National Labor Relations Board and file her own section 8(a)(3) charge, and that the grievance and arbitration procedures of the collective bargaining agreement should provide only an alternative, supplementary remedy and not a basis for preventing the individual from going to the Board.

It is heartening to see that at least some of the courts have indicated that there must be scrupulous attention paid to whether there is a conflict of interest between the union and the employee in those situations. If any such conflict exists, the employee should not be precluded from having direct access to the Board.

CONCLUSION

There is a distinction between contract rights and statutory rights which must be always kept in mind in this area of law. Ordinarily, the

43. The *Collyer* doctrine was extended to § 8(a)(3) discrimination cases in *National Radio Co.*, 198 N.L.R.B. 527 (1972). *National Radio* was overruled in *General American Transportation Co.*, 228 N.L.R.B. 808 (1977), which in turn was overruled in *United Technologies Corp.*, 268 N.L.R.B. 557 (1984), which revitalized the *National Radio* doctrine favoring deferral in § 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2) cases.

fundamental function of the arbitrator is to interpret and enforce contract rights, and, ordinarily, the fundamental function of administrative agencies like the NLRB and the courts is to interpret and enforce statutory rights. If this distinction is understood and maintained, defining the role of external law in arbitration will cease to be a difficult process.